Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL JOHN BAK,

Petitioner,

v.

PEOPLE OF REDFORD TOWNSHIP,

Respondent.

On Petition For Writ Of Certiorari To The State Of Michigan, Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

LISA DWYER
Counsel of Record for Petitioner
645 Griswold St.
1817 Penobscot Building
Detroit, Michigan 48226
(313) 961-4115

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT'S ADMISSION OF CONTACTS BETWEEN THE DEFENDANT AND COMPLAINANT, OR COMPLAINANT'S FAMILY, PRIOR TO THE ENACTMENT OF THE STALKING STATUTE VIOLATED THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION, DEPRIVING PETITIONER OF DUE PROCESS, REQUIRING REVERSAL?

II. WHETHER THE STALKING STATUTE AS APPLIED TO THE FACTS IN THIS CASE IS VOID FOR VAGUENESS AND UNCONSTITUTIONALLY OVERBROAD WHERE: (A) PETITIONER'S CONDUCT IS PROTECTED BY THE FIRST AMENDMENT; AND (B) PETITIONER DID NOT HAVE FAIR NOTICE OF PROSCRIBED CONDUCT?

III. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A DIRECTED VERDICT OF ACQUITTAL, WHERE THERE WAS INSUFFICIENT EVIDENCE PRESENTED ESTABLISHING THE ELEMENTS OF THE CRIME OF STALKING?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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BASIS OF JURISDICTION IN THIS COURT

The judgment of the Michigan Supreme Court was entered on June 26, 2001. This petition is being filed within ninety (90) days of that date as required by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 10(c).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Article I, § 10, Clause 1 provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. Constitution, Amendment I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment XIV, § 1 provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner (hereinafter referred to as Mr. Bak), charged with stalking in violation of Redford Township Ordinance § 58-60[1], was jury-convicted in the 17th District Court for the State of Michigan on August 11, 1995, the Honorable Karen S. Khalil presiding. Mr. Bak was sentenced to serve a term of probation.

Prior to trial, Mr. Bak's counsel argued a Motion to Dismiss the stalking charge on the grounds that the Redford Township statute was unconstitutionally vague and overbroad. Further, Mr. Bak argued that the Ordinance created an unconstitutional burden of proof denying him due process of law. The trial court denied Mr. Bak's Motion, concluding that the Redford Township stalking statute was not overly broad or vague (Appendix B, App. 8-9).

Jury trial in the matter commenced on August 11, 1995. Prior to trial, defense counsel brought a motion to exclude from evidence alleged incidents between the complainant and Mr. Bak which had occurred prior to the enactment of either the Redford Township Stalking Ordinance or the Michigan Stalking Statute in 1993. Defense counsel argued that admission of such incidents, which

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[1] Redford Township Ordinance § 58-60 was enacted in June 1993.

were not criminal at the time they were allegedly committed, violated the *ex post facto* clause of both the United States and Michigan Constitutions. Also, Defense counsel argued that any warnings made by the complainant or the complainant's family to Mr. Bak to stay away from the complainant prior to the Statute's enactment should be held inadmissible. The trial court granted Mr. Bak's motion in part, excluding from evidence any contact Mr. Bak had with the complainant prior to the Statute's enactment (Appendix C, App. 11-12). Additionally, the trial court ruled that it would not allow any testimony related to contacts Mr. Bak had with other children (Appendix C, App. 11-12). The trial court did indicate, however, that it would allow testimony from the complainant's father, specifically that, on one occasion prior to the statute's enactment, he told Mr. Bak to have no contact with his daughter (Appendix C, App. 11-16).

Kelly Ann McHenry, the complainant, was the first witness for the prosecution. Giving context to the relationship between complainant and Mr. Bak, she testified that she first met Mr. Bak as a ten-year-old fifth grader attending St. Robert Bellermine School. According to the witness, Mr. Bak worked at the parish basketball games she attended at St. Robert. The complainant acknowledged that when she first met Mr. Bak there was nothing out of the ordinary about their relationship – she was not afraid of him, nor did she tell him that she did not want him around her.

In September, 1993, complainant saw Mr. Bak at St. Robert's Fair. Mr. Bak approached her outside the carnival tent where the games for the fair were being held and offered her some stuffed animals that he had won at the

fair. At first, complainant told Mr. Bak that she did not want them, but when he persisted, she took the animals, went to her mother and told her mother of the gift.

During the next six months, complainant would see Mr. Bak at mass in church, with no contact between them.

In March, 1994, complainant was confirmed at St. Robert's Church, followed by a reception hosted by the church and held in the church gymnasium. The complainant agreed that the reception was for parents and friends of the persons being confirmed. At this reception, Mr. Bak approached her and said "hi" or "congratulations" to her, at which time she turned and walked away.

On March 18, 1994, the complainant received an unsigned birthday card, reading, "God bless you on your birthday and always". It also said, "The Lord bless and keep you, the Lord make his face shine upon you and be gracious to you." Around the same time, the complainant also received an unsigned Confirmation card, reading, "for someone special as she graduates," that included a prayer in it stating, "I said a prayer for you today".

The complainant testified that for the six months subsequent to her Confirmation and receiving of cards, she saw Mr. Bak in Church, but that he did not talk to her or approach her.

In September 1994, the complainant, who was now fourteen years old, was at St. Robert's Fair when Mr. Bak approached and spoke to her, saying that he would like to talk to her. The complainant told him that she did not want to speak with him, at which point Mr. Bak responded, "I won't say anything wrong, I just need to

talk to you." She testified that she told Mr. Bak three to four times that she did not want to talk to him, and left to find a police officer because she was scared.

On cross-examination, the complainant recanted her prior testimony and admitted that she did not tell Mr. Bak that she did not want to talk to him. Further, the complainant acknowledged that at the 1994 fair, Mr. Bak did not grab her, threaten her, make sexually suggestive comments to her, or come after her when she left him to find a police officer. She also admitted that she did not tell Mr. Bak that she was scared of him.

The complainant testified that throughout these church events, Mr. Bak never touched her in an inappropriate or sexual manner, nor did he make inappropriate or sexual remarks to her. Mr. Bak never threatened her, threatened to get even with her, nor did he ever raise his voice or talk mean to her.

The final question to complainant during cross-examination was:

> Q. Other than sending you some nice cards and giving you some teddy bears and saying hello once in a while, that's the only contact you've had with Mr. Bak, right?
>
> A. Yes.

After cross-examination was completed, the prosecutor outside the presence of the jury, moved the trial court to allow him to introduce evidence of contacts that had occurred between the complainant and Mr. Bak prior to the enactment of the Stalking Statute, arguing that defense counsel had led the jury to believe that the only

contacts that Mr. Bak had had with the complainant were the ones that occurred subsequent to the Statute's enactment. Over objections from defense counsel and contrary to the trial court's own prior and explicit ruling, the trial court decided to allow the prosecution to ask the complainant about contacts which had occurred prior to 1993, the year of the Stalking Statute's enactment.

On redirect examination, the prosecution elicited from the complainant testimony concerning an event which occurred in 1992, prior to the enactment of the Redford Township Stalking Ordinance. The complainant testified that when she was twelve years old, Mr. Bak followed her and her friend home from school and had pulled at her friend's school bag causing her pencils to fall out. Mr. Bak apologized to the friend saying "I didn't mean to do that". After the pencils were picked up, the three of them continued walking and talking.

On re-cross-examination, the complainant admitted talking to Mr. Bak when he walked with her home from school. The complainant never told Mr. Bak that she was frightened of him or that he should stay away. Mr. Bak never threatened or touched her on the way home from school.

During closing argument, the prosecutor stressed to the jury that they must consider "the whole picture". And, during rebuttal, the prosecution specifically instructed the jury to consider "the whole picture," referring to the 1990 contact between Mr. Bak and complainant, and contacts by the police to Mr. Bak in 1989.

Defense counsel did not request a limiting instruction from the judge regarding the weight the jury should give

the 1990 contact. When the Court read the stalking instruction, the Court did not *sua sponte* instruct the jury to consider only those contacts after 1993 as evidence of a course of conduct.

On August 11, 1995, the jury found Mr. Bak guilty of stalking.

Mr. Bak appealed by right to the Wayne County Circuit Court, pursuant to Article 1, § 20 of the Michigan Constitution, MCR 1985, 7.101(B)(1). Mr. Bak, in his appeal of right raised three issues: 1) the trial court erred in denying the motion for a directed verdict of acquittal, where there was insufficient evidence presented establishing the elements of the crime of stalking; 2) the trial court's admission of acts which occurred prior to the enactment of the stalking ordinance violated the *ex post facto* clause of the United States and Michigan Constitutions; and 3) the Redford Township Stalking Statute is unconstitutionally vague and overbroad.

On March 26, 1996, Mr. Bak's conviction and sentence were affirmed in the Wayne County Circuit Court. A timely motion for rehearing/reconsideration was filed and ultimately denied by the Wayne County Circuit Court Judge hearing Mr. Bak's appeal of right.

On October 11, 1996, Defendant-Appellant filed a Delayed Application for Leave to Appeal in the Michigan Court of Appeals, raising four issues: 1) the trial court's admission of contacts between the Defendant and the Complainant prior to the enactment of the Stalking Ordinance violated the *ex post facto* provision of the United States Constitution; 2) the Stalking Ordinance as applied

to the facts of this case is void for vagueness and unconstitutionally overbroad where: (a) Petitioner's conduct was and is protected by the First Amendment; and (b) where Petitioner did not have fair notice of the proscribed conduct; 3) the trial court erred in denying the motion for a directed verdict of acquittal, where there was insufficient evidence presented establishing the element of the crime of stalking; and 4) Petitioner was denied his due process right to the effective assistance of trial counsel.

On March 15, 1997, the Michigan Court of Appeals entered an Order denying Defendant-Appellant's Application for Leave to Appeal.

Thereafter, Defendant-Appellant filed an Application for Leave to Appeal with the Michigan Supreme Court. On May 27, 1998, the Michigan Supreme Court entered an Order remanding this case to the Michigan Court of Appeals to consider this case on its merits.

On July 11, 2000, the Michigan Court of Appeals issued an Opinion and Order affirming Mr. Bak's conviction. Mr. Bak, through counsel, filed a Motion for Rehearing/Reconsideration in the Michigan Court of Appeals. On September 28, 2000, the Michigan Court of Appeals entered an Order Denying Mr. Bak's Motion for Reconsideration.

Mr. Bak then once again filed a Delayed Application for Leave to Appeal to the Michigan Supreme Court raising the same issues he had in the Michigan Court of Appeals. On June 26, 2001, the Michigan Supreme Court

entered an Order Denying Mr. Bak's Delayed Application for Leave to Appeal.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT'S ADMISSION OF CONTACTS BETWEEN THE PETITIONER AND COMPLAINANT, OR COMPLAINANT'S FAMILY, PRIOR TO THE ENACTMENT OF THE STALKING STATUTE VIOLATED THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION DEPRIVING PETITIONER OF DUE PROCESS, REQUIRING REVERSAL.

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") governs federal habeas review of the state court judgment. Under the AEDPA, a writ will issue when the state court adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

This case raises questions regarding the application of the *ex post facto* clause of the United States Constitution, where conduct occurring prior to a statute's enactment is prosecuted as criminal action. Petitioner submits that Respondent prosecuted conduct occurring prior to the enactment of the Redford Township Ordinance as criminal action because contacts subsequent to the enactment of the stalking statute, did not satisfy even the vague and overly broad definition of the crime in this ordinance, such to support the conviction herein. (Issue

II, herein). Therefore, admission into evidence of the contacts between the complainant and/or complainant's family and Petitioner prior to the enactment of the Redford Township Stalking Ordinance in 1993 violates the *ex post facto* clause of the United States Constitution. As such, Petitioner was denied a fair trial and his conviction should be reversed.

Prior to trial, defense counsel made a motion to exclude from evidence any contacts occurring between the complainant and the Petitioner prior to the enactment of the Redford Township Stalking Statute in 1993. Although the Court initially granted the motion, the Court reversed itself during trial and allowed into evidence such prior contacts.

Article I, § 10 of the United States Constitution states: "No . . . *ex post facto* Law" shall be passed. A criminal law is *ex post facto* where it is applied to events which occurred prior to its enactment and where it disadvantages the offender affected by the law. *People v. Potts*, 181 Mich. App. 311, 448 N.W.2d 820 (1989). A statute or ordinance which effects the prosecution or disposition of criminal cases involving an act committed prior to the effective date of the ordinance violates the *ex post facto* clauses of the United States and State Constitutions if *it makes punishable that which was not*, makes an act a more serious criminal offense, increases the punishment, or *allows the prosecution to convict on less evidence. People v. Slocum*, 213 Mich. App. 239, 539 N.W.2d 572 (1995); *People v. Moon*, 125 Mich. App. 773, 337 N.W.2d 293 (1983) (emphasis added).

In the present case, admission into evidence of the contact which occurred between Petitioner and the complainant prior to the enactment of the Redford Township Stalking Ordinance in 1993 violated the *ex post facto* clause because those contacts were prosecuted as criminal actions, providing the necessary grounds for the prosecution to argue a harassing course of conduct. In other words, the prosecution was able to convict the Petitioner with less or insufficient evidence, by making punishable that which was not, because he was not held to proving a harassing course of conduct occurring subsequent to the statute's enactment. Instead, once realizing the post-enactment conduct may not have the flavor of "harassment", he asked the trial court to overrule itself, so he could introduce and argue the pre-enactment contact as criminal.

The stated reason that the prosecutor made his motion to allow into evidence these past acts was because he felt that defense counsel had left the jury with the impression that the only contact occurring between the Petitioner and the complainant had occurred after passage of the stalking ordinance. In fact, defense counsel had not created any impression – the complainant's own testimony in response to cross-examination was subject to its own interpretation by the fact finder. Further, testimony bore out the context of Petitioner and complainant's relationship as co-church members and parishioners, pre-statute-enactment, therefore, other contacts were presumed to have occurred.

By allowing this evidence to be admitted, the trial court's ruling permitted the improper bolstering of the prosecution's case with evidence of acts that were not

subject to criminal scrutiny when they occurred. The danger Petitioner sought to avoid by seeking exclusion of these contacts, that the jury would confuse argumentation with the actual charge, occurred. Additionally, the introduction of these contacts combined with the prosecution's encouragement to convict Petitioner on the basis of these contacts, deprived Petitioner a fair trial and due process of law. The trial court's failure to exclude these acts from evidence violates the *ex post facto* clause of the Federal and State Constitutions, and thereby mandates reversal.

The Michigan Court of Appeals rejected Mr. Bak's *ex post facto* argument, reasoning that because the trial judge instructed the jury that, "the evidence must convince you beyond a reasonable doubt that the crime occurred between the dates of September 1993 and September 1994 within the Township of Redford," the jury presumably followed the instructions and did not use any of the contacts before the ordinance was enacted to support the conviction. (Appendix A).

Petitioner respectfully submits that the instruction in this case did not protect him from being convicted on the basis of contacts that occurred prior to the enactment of the ordinance. First, in order to convict the Defendant, the jury had to find that there were at least two contacts between the Defendant and the complainant, establishing a course of conduct, that would cause a reasonable person to feel emotional distress. It is probable that the jury utilized a contact that occurred prior to June 1993, the date the ordinance was enacted, in order to meet the "course of conduct" element. After all, the prosecution's argument inviting jurors to look to these contacts during

deliberation went without objection or curative instruction from the trial court.

Second, the prejudicial impact of allowing this testimony is facially apparent. The particular pre-enactment contact introduced, was the most unusual, in that it alleged that Defendant was "following the complainant home from school" and grabbed a schoolmate's arm, throwing her book bag to the ground. As such, the jury would have had the very difficult job of sifting out what must in fact be proven, after presented with irrelevant pre-enactment contacts, especially when the prosecutor urged the jury:

> "*You got to look at the whole picture.* You go back to when Mr. Bak is following Kelly home from school after being told not to, grabbing her friend's book bag and throwing it on the ground. The girls didn't want to have any contact with them. Their [sic] walking away. They see Mr. Bak and they start speeding up. And what does he do, he comes after them and grabs something from them. I think when you *consider – when you look at the instances of conduct that happened later on and when you consider that along with everything else that happened,* that would cause, that those instances would cause a reasonable person to feel threatened, harassed, and intimidated." (Trial Transcript 235-236, emphasis added).[2]

As such, the instruction given by the Court did not protect Petitioner from being convicted on the basis of

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[2] The transcript reveals that this incident occurred prior to the enactment of the ordinance. (See Trial Transcript pp. 72-95.)

conduct which occurred prior to enactment of the ordinance and, thus, renders his conviction unconstitutional in violation of the *ex post facto* clause.

II.

THE STALKING STATUTE AS APPLIED TO THE FACTS IN THIS CASE IS VOID FOR VAGUENESS AND UNCONSTITUTIONALLY OVERBROAD WHERE: (A) PETITIONER'S CONDUCT IS PROTECTED BY THE FIRST AMENDMENT; AND (B) PETITIONER DID NOT HAVE FAIR NOTICE OF PROSCRIBED CONDUCT.

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") governs federal habeas review of the state court judgment. Under the AEDPA, a writ will issue when the state court adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

This case raises questions regarding the language of the Redford Township Stalking Ordinance as void for vagueness and as being unconstitutionally overbroad in violation of the First Amendment.

The Redford Township Stalking Ordinance provides:

Sec. 58-60. Stalking.

(a) As used in this section:

Course of conduct means a patterns of conduct composed of a series of two or more separate noncontinuous acts, *evidencing a continuity of purpose.*

Emotional distress means a *significant mental suffering or distress* that may, but does not necessarily, require medical or other professional treatment or counseling.

Harassment means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. *Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.*

Stalking means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested.

Unconsented contact means any contact with another individual that is initiated or continued without the contacted individual's consent, or in disregard of that individual's expressed desire that the contact is avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

(1) Following or *appearing within sight of that individual;*

(2) Approaching or confronting that individual in a *public place* or on private property;

(3) Appearing at the workplace or residence of that individual;

(4) Entering onto or remaining on property owned, leased or occupied by that individual;

(5) Contacting the individual by telephone;

(6) Sending mail or electronic communications to that individual;

(7) Placing an object on or delivering an object to property owned, leased or occupied by that individual.

Victim means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

(b) Any person who engages in stalking is guilty of a misdemeanor, and upon conviction is subject to punishment as prescribed in section 1-11 of this Code.

(c) In a prosecution for a violation of this section evidence that the defendant continued to engage in a course of conduct involving repeated, unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact and to refrain from any further unconsented contact with the victim shall give rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested.

(d) A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other

> criminal offense arising from the same conduct or for any contempt of court arising from the same conduct.
>
> (e) Except as otherwise stated, any person found guilty of any of the foregoing offenses shall be deemed guilty of the commission of a misdemeanor and punished as prescribed in section 1-11 of this Code. (Ord. No. 1611, § 7, 6-21-93).

It is well-settled that an individual may challenge a statute, on its face, if it infringes on rights protected by the First Amendment. *Chicago v. Morales*, 527 U.S. 41, 52 (1999) (Stevens, J., plurality); *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973); *Belle Maer Harbor v. Charter Township of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999). Such an attack will be successful upon a showing that the challenged statute trenches upon a substantial amount of First Amendment protected conduct relative to the statute's plainly legitimate sweep. *Id.* As a result, in the instant case, this Court must conduct a facial analysis to determine whether the Redford Township Stalking Statute violates the First Amendment.

The due process clause of the Fourteenth Amendment prohibits Statutes or Ordinances that are void for vagueness. *People v. Smith*, 75 Mich. App. 64, 254 N.W.2d 654 (1977). A basic principle of due process is that a criminal statute or ordinance is void for vagueness if its prohibitions cannot be clearly defined, if it does not provide for notice of the conduct prescribed, if it confers on a trier of fact unlimited or unfettered discretion to determine whether or not an offense has been committed, or if its coverage is overly broad and impinges on First

Amendment freedoms. *People v. Gagnon*, 129 Mich. App. 678, 341 N.W.2d 867 (1983); *People v. Wilson*, 139 Mich. App. 205, 362 N.W.2d 798 (1984).

A criminal statute or ordinance will fall if it fails to give a person of ordinary intelligence reasonable notice that his behavior may be unlawful. *People v. Ford*, 417 Mich. 66, 331 N.W.2d 878 (1982). Petitioner's arguments warrant a facial analysis because: (1) the statute at issue contains no substantial *mens rea* requirement; *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (explaining that absence of an intent requirement is an important factor to be considered when determining whether a statute is unconstitutionally vague); (2) the statute carries with it substantial criminal penalties including imprisonment; and (3) the more recent decisions of the Supreme Court indicate that facial challenges on due process grounds are appropriate. *Staley v. Kurt Jones*, 239 F.3d 769, 781 (6th Cir. 2001) (First Amendment overbreadth challenges are reviewable on habeas petition).

It is well-settled that a federal court should analyze a state statute that is challenged on vagueness grounds as it has been interpreted by the state's highest court. *Kolender v. Lawson*, 461 U.S. 352, 355-56 n.4 (1983) ("for the purpose of determining whether a state statute is too vague or indefinite to constitute valid legislation we must take the statute as read precisely as the highest court of the State has interpreted it."). Because the Michigan Supreme Court has not yet interpreted the meaning of Michigan's Aggravated Stalking Statute, which mirrors the Redford Township statute, this Court must analyze the statute in light of the Michigan Court of Appeals decision in *People v. White*, 536 N.W.2d 876 (Mich. Ct. App. 1995).

In *People v. White*, the Michigan Court of Appeals noted that " 'harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose,' and such protected activity or conduct has been defined as labor picketing or other organized protests." *White*, 536 N.W.2d at 883 (citing *Pallas v. Florida*, 636 So. 2d 1358, 1360 (Fla. Ct. App. 1994). On habeas review in the Western District of Michigan, the *Staley* court held that the *White* court's reference to labor picketing or other organized protests was a deliberate statement by the state court that only those activities are exempted from the definition of harassment. *Staley v. Jones*, 108 F. Supp. 2d 777, 784, n.16. (W.D. Mich. 2000). On appeal, the Sixth Circuit disagreed with the district court interpretation stating, "there is no indication that the White court's reference to labor picketing and other organized protests were the only activities excluded by the limiting language." *Staley*, 239 F.3d at 781. The Sixth Circuit found the language in White "illustrative not exhaustive, because, in its overbreadth analysis, it concluded that 'the statute could not be applied to entirely innocent conduct.' " *Staley*, 239 F.3d at 782, citing *White*, 536 N.W.2d at 883. Similarly, the Sixth Circuit looked to the Michigan Court of Appeals language in *People v. Kieronski*, 214 Mich. App. 222, 542 N.W.2d 339 (Mich. Ct. App. 1995), where that court held that the defendant's conduct was not exempted under the harassment definition because, although he may have had legitimate business at the public places at which he threatened his victim, the court could discern no legitimate purpose in approaching or confronting the victim in those places. *Staley*, 239 F.3d at 783.

In the present case, Petitioner submits his facts are distinguished from those exhaustively considered by the Sixth Circuit in *Staley v. Jones*. Citing *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973), the *Staley* court acknowledged that "[t]he standing exception for First Amendment challenges is based on the recognition that 'the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.' " *Staley*, 239 F.3d at 784. However, in analyzing overbreadth challenges, the *Broadrick* court concluded, "[t]o put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615-16. Thus, on Staley's overbreadth challenge, the Sixth Circuit found that because the stalking statute addresses a willful pattern of conduct, "any effect on protected speech is marginal when weighed against the plainly legitimate sweep of the statute, and certainly does not warrant facial invalidation of the statute." *Staley*, 239 F.3d at 787.

In this instance, Petitioner's First Amendment freedom of religion, the practice and exercise thereof, constitutes speech and conduct, all constitutionally guaranteed. Although the Sixth Circuit in *Staley v. Jones, supra,* assessed the overbreadth challenge by weighing speech versus conduct in light of *Broadrick, supra,* the *Staley* court did not foreclose conduct-related overbreadth challenges:

"[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Staley*, 239 F.3d at 788, citing *Broadrick*, 413 U.S. at 615-616.

Petitioner has a First Amendment freedom in his legitimate practice of religion at his church, and those functions so sponsored. There is a legitimate purpose for one church member to congratulate another on her confirmation, and even to send a card with a religious message in that context. The Redford Township Stalking Ordinance is void for vagueness and unconstitutionally overbroad because it does not provide for notice that this behavior is unlawful. Specifically, while the statute precludes from the definition of harassment constitutionally protected activity or conduct that serves a legitimate purpose, all post-enactment conduct occurring in the context of church functions remained open to criminal scrutiny. Certainly, a church member cannot be legally on notice that attending church-sponsored functions, in the spirit of those functions, could result in criminal charges. Petitioner contends that the ordinance is overbroad and prohibits constitutionally protected behavior, contrary to the First Amendment.

Petitioner submits that many of the prohibitions contained within the Redford Township Stalking Ordinance impinge upon constitutionally protected or legitimate acts, and, additionally, do not specifically define what type of conduct is legal or illegal. In this instance, Petitioner appeared within sight of complainant, but only during functions hosted by his and complainant's church, St. Robert's. Further, other than the absolutely legitimate intent of practicing his religion and participating in

church-sponsored events, there was no evidence of any other illegitimate or criminal intent on the part of Petitioner.

It is not clear here where the stalking ordinance prohibitions would apply to the Petitioner's conduct. In fact, all of the conduct[3] that the Michigan Court of Appeals relied on to uphold Mr. Bak's conviction clearly fell within the protection of the First Amendment. As such, the Petitioner would contend that the Redford Township ordinance is unconstitutionally overbroad and void for vagueness as applied to him.

III.

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A DIRECTED VERDICT OF ACQUITTAL, WHERE THERE WAS INSUFFICIENT EVIDENCE PRESENTED ESTABLISHING THE ELEMENTS OF THE CRIME OF STALKING.

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996)

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[3] The conduct the Michigan Court of Appeals relied on was: (1) in September 1993, defendant approached the victim at a church fair and offered her some stuffed animal toys; (2) between September 1993 and March 1994, defendant stared at the victim during several church services; (3) in March 1994, defendant tried to speak to the victim at her confirmation reception; (4) in March and June 1994, defendant mailed the victim two unsigned cards; (5) in September 1994, defendant drove slowly by her house; and (6) in September 1994, defendant approached her and tried to speak to her at a church fair, despite her repeated refusals on that occasion to speak with him (Appendix A, App. 4-5).

("AEDPA") governs federal habeas review of the state court judgment. Under the AEDPA, a writ will issue when the state court adjudication resulted in a decision that (1) was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." The Supreme Court has also explained that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 120 S. Ct. 1495 (2000) (O'Connor, J., concurring).

This case involves an unconstitutional lack of evidence in the trial proofs, such that the prosecution failed to present evidence establishing beyond a reasonable doubt that Petitioner was guilty of the crime of stalking. The trial court erred in refusing to grant a Motion for Directed Verdict of Acquittal in the Petitioner's favor at the close of the prosecution's proofs.

Where an appellate court finds that the evidence presented at the trial was insufficient to sustain a jury's verdict of guilty, the remedy for the reviewing court is to enter a judgment of acquittal. *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1977).

An essential element of the Due Process Clause of the 14th Amendment is that no person shall be convicted of a criminal offense unless there is sufficient proof, defined as the evidence necessary to convince a trier of fact

beyond a reasonable doubt of the existence of every element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 566 (1979), *People v. Hampton*, 407 Mich. 354, 285 N.W.2d 284 (1979), *cert. denied*, 449 U.S. 885, 101 S. Ct. 239, 66 L. Ed. 2d 110 (1980). Evidence is insufficient to sustain a conviction if it would not support a finding of guilty beyond a reasonable doubt. *People v. Matthews*, 53 Mich. App. 232, 218 N.W.2d 838 (1974).

The test for a Motion for a Directed Verdict of Acquittal is not whether there is any evidence to support the prosecution's position regarding each element of the offense; rather, the question is whether viewed in a light most favorable to the prosecution, the evidence is sufficient to permit a rational trier of fact to find that the essential elements of the crime had been proven beyond a reasonable doubt. *People v. Herbert*, 444 Mich. 466, 511 N.W.2d 654 (1993). If sufficient evidence is not presented, a Directed Verdict of Judgment of Acquittal should be entered. *People v. Potter*, 115 Mich. App. 116, 320 N.W.2d 313 (1982); *People v. Hampton, supra.*

In the present case, the evidence presented at the trial was insufficient to convict the Petitioner of the offense of stalking. Stalking is a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested.

Recently, in *People v. Kieronski*, 214 Mich. App. 222, 229-230 (1995), the Michigan Court of Appeals reinstated

an aggravated stalking case after the trial court had granted the Defendant's Motion to Quash the Information. In doing so, the Court of Appeals noted that there was ample evidence of stalking where the Defendant had told the victim several times that "he would get her" or "I'll get you bitch" and had threatened her parents. *People v. Kieronski, supra* at 232-233.

Similarly, in *People v. White*, 212 Mich. App. 298, 536 N.W.2d 876 (1995), a case involving the constitutionality of the Michigan stalking statute, the Defendant had been convicted of aggravated stalking where there was evidence that he had phoned the victim, sometimes fifty to sixty times a day, and did make verbal threats on at least ten occasions to kill her and her family. *People v. White, supra,* at 883.

By contrast, in the present case there was no credible evidence presented to prove a single essential element of stalking beyond a reasonable doubt. The evidence presented showed that the Petitioner had only five to six contacts with the complainant over a four year period. The contacts alleged to support Defendant's willful "course of conduct" included:

September, 1993 –	Defendant gave complainant some stuffed animals at the church fair;
March, 1994 –	Defendant said congratulations or hello to complainant at the church confirmation reception;
March, 1994 –	Defendant sent complainant a birthday card;

June, 1994 –	Defendant sent complainant a confirmation card;
September, 1994 –	Defendant asked to talk to complainant at the church fair.

The trial evidence indicated that the Petitioner gave stuffed animals to the complainant at a 1993 fair sponsored by his church, but only after complainant's mother consented to Defendant's contact with complainant – specifically, the gift of stuffed animals. The complainant acknowledged that the Petitioner never touched or assaulted her, never made any threats to harm her, never made any sexually suggestive remarks, and never followed her once she indicated the desire to end the contacts. The complaining witness also acknowledged that prior to the last incident at the 1994 fair, she had never told the Petitioner that she did not want to have any contact with him.

The conduct complained of here was not of the type to cause a reasonable person to feel terrorized, frightened, intimidated, harassed or molested. *People v. Kieronski, supra.* **There was no showing of emotional distress. In fact, complainant testified that Defendant never did anything to cause her to be scared.** Unlike the defendants in the *White* or *Kieronski* cases, the Petitioner here did not make any threats to kill or injure either the complainant or her family, **nor was there constant repetitive contact between the Petitioner and the complainant such to justify establishment of a "course of conduct".** As such, the evidence was insufficient to convict.

Further, there was **an insufficient showing of unconsented contacts**. Unconsented contact, as defined by statute, means any contact with another individual that is initiated or continued without that individual's consent, or in disregard of that individual's express desire that the contact be avoided or discontinued.

Complainant testified at trial that she never told Petitioner she was not supposed to talk to him or was scared of him. Although Petitioner was told by complainant's father in 1990 not to have contact with complainant, **complainant's mother permitted Petitioner to give complainant the stuffed animals at the church fair in 1993**. Thus, complainant waived notice to Petitioner that his contacts would be construed as unconsented contacts.

The definition of waiver is:

> WAIVER. The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contact, with full knowledge of the material facts, does or forbears to do something the doing of which is inconsistent with the right, or his intention to rely upon it. The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege, or of the opportunity to take advantage of some defect, irregularity or wrong. A doctrine resting upon an equitable principle, which courts of law will recognize. *Atlas Life Insurance Co. v. Schrimsher*, 197 Okl. 643, 66 P.2d 944, 948.

> IMPLIED WAIVER. A wavier is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a wavier, and has incurred trouble or expense thereby. To make out a case of implied "waiver" of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amounting to an estoppel on his part *Rosenthal v. New York Life Insurance Company*, C.C.A. Mo., 99 F.2d 578, 579.

Black's Law Dictionary 1417 (5th ed., 1979)

By definition, complainant waived any notice to Petitioner that his actions would be considered unconsented contacts when her mother gave him permission to give her daughter the stuffed animals at the 1993 church fair.

In this case, the prosecution failed to prove the essential elements of stalking: "unconsented contact", "course of conduct" or "harassment/emotional distress." Where there was insufficient evidence to convict Petitioner of stalking, this Court should reverse the conviction and enter a judgment of acquittal. *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1977); *People v. Hampton*, 407 Mich. 354, 285 N.W.2d 284 (1979), *cert. denied*, 449 U.S. 885, 101 S. Ct. 239, 66 L. Ed. 2d 110 (1980);

People v. Potter, 115 Mich. App. 116, 320 N.W.2d 313 (1982).

CONCLUSION

For all of the reasons stated and authority cited herein, the within Petition for Writ of Certiorari should be granted, and the Court should reverse Petitioner's conviction on his claims.

Respectfully submitted,

LISA DWYER (P 47961)
Attorney for Petitioner
645 Griswold, Suite 1817
Detroit, Michigan 48226
(313) 964-2255

Dated: September 24, 2001

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF REDFORD TOWNSHIP, Plaintiff-Appellee, v MICHAEL JOHN BAK, Defendant-Appellant.	UNPUBLISHED July 21, 2000 No. 212056 Wayne Circuit Court LC No. 95-529988-AV

Before: Cavanagh, P.J., and Holbrook, Jr., and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of misdemeanor stalking in violation of the Redford Township anti-stalking ordinance Ch 58, Art III, § 58-60 (hereinafter "the ordinance"). We affirm.

While he was in his late thirties and early forties, defendant contacted the young female victim on several separate occasions. The contacts began when the girl was ten and continued until she was fourteen. Several years after the contacts began, plaintiff enacted the ordinance. When the contacts continued after the ordinance's enactment, defendant was arrested, tried, and convicted for misdemeanor stalking.

Defendant first argues that the trial court violated the Ex Post Facto Clauses of the federal and state constitutions, U.S. Const, art I, § 9, cl 3; Const 1963, art 1, § 10, when it admitted evidence of contacts that occurred

between defendant and the victim before the township stalking ordinance was enacted. We disagree. A law which affects the prosecution or disposition of criminal cases involving crimes committed before the law's effective date violates the constitutional prohibition against ex post facto laws if the law "(1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence." *Riley v Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996).

The ordinance was enacted on June 21, 1993. The following contacts occurred before the ordinance's enactment: (1) defendant's contacts with the victim at basketball games when she was ten years old; (2) defendant's walking or following the victim home from school when she was ten or twelve years old; (3) defendant's requesting permission from the victim's mother to give the victim a stuffed animal; and (4) the victim's father warning that defendant should stay away from his daughter. The remaining contacts, see *infra* at 3, occurred after the ordinance was enacted.

The district court allowed the introduction of testimony regarding those contacts occurring before the ordinance's enactment, ruling that defendant had opened the door to such testimony on cross-examination. The circuit court affirmed, albeit on different grounds.[1] We agree

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[1] The circuit court relied on *United States v Poulos*, 895 F.2d 1113, 1119-1120 (CA 6, 1990), abrogated on other grounds in *Horton v California*, 496 US 128; 110 S Ct 2301; 110 L Ed 2d 112 (1990), for the rule that a defendant may be convicted of an offense which begins before the law's enactment, but involves

with the district court that defendant opened the door to testimony about the prior contacts. In any event, we note that the jury was specifically instructed that only those contacts that occurred after the ordinance was enacted should be considered for purposes of the offense charged. "[T]he evidence must convince you beyond a reasonable doubt," the trial court instructed, "that the crime occurred between the dates of September, 1993, and September, 1994, within the Charter Township of Redford." A jury is generally presumed to follow the trial court's instructions, until the contrary is clearly shown. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). The contrary has not been shown in this case.

Defendant next contends that the township ordinance is unconstitutionally vague and overbroad. We disagree. The ordinance is almost identical to the state stalking statute, M.C.L. § 750.411h; MSA 28.643(8), which we upheld against the same challenges in *People v White*, 212 Mich App 298; 536 NW2d 876 (1995). For the same reasons set forth in *White*, we conclude that the ordinance here is neither unconstitutionally overbroad nor vague. *Id.* at 308-313.

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conduct continuing after the law's enactment. The circuit court held, "Appellant here is not being punished for his pre-enactment course of conduct of harassing complainant but for continuing this conduct even after the stalking ordinance came into existence." We do not believe that *Poulos*, which involved the possession of two gun silencer kits that were neither registered nor identified by serial numbers, applies, given the circumstances of the case at hand.

Defendant also argues that the prosecution failed to present sufficient evidence at trial to support his conviction. We disagree. "In reviewing a sufficiency of the evidence question, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proved beyond a reasonable doubt." *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998). In order to be convicted of the ordinance at issue, the prosecution is required to prove: (1) that the defendant willfully engaged in two or more separate, noncontinuous acts, evidencing a continuity of purpose; (2) that such contacts were initiated without the victim's consent, or in disregard of her expressed desire that such contact be avoided or discontinued; (3) that the unconsented to acts would cause a reasonable person to suffer emotional distress; and (4) that the victim actually suffered emotional distress due to these unconsented to contacts.

The prosecution presented testimony that defendant contacted the victim multiple times, over a long period of time. After the ordinance was enacted, defendant contacted the victim on six separate occasions: (1) in September 1993, defendant approached the victim at a church fair and offered her some stuffed animal toys; (2) between September 1993 and March 1994, defendant stared at the victim during several church services; (3) in March 1994, defendant tried to speak to the victim at her confirmation reception; (4) in March and June 1994, defendant mailed the victim two unsigned cards; (5) in September 1994, defendant drove slowly by her house; and (6) in September 1994, defendant approached her and tried to speak to her at a church fair, despite her repeated refusals on that

occasion to speak to him. We believe on this evidence, a reasonable jury could have found that defendant willfully engaged in two or more separate, noncontinuous acts, evidencing a continuity of purpose.

We also believe sufficient evidence was presented to establish the second element of the offense. The township ordinance defines unconsented contact to include "following or appearing within sight of the individual;" "approaching or confronting that individual in a public place or on private property;" or "sending mail . . . to that individual." The evidence produced at trial showed that defendant engaged in each of these types of prohibited contact. Furthermore, the evidence showed that each time defendant attempted to speak to the victim, she either walked away or told him she did not want to speak with him. As for the two unsigned cards sent in March and June 1994, we believe a jury could have reasonably inferred that defendant concealed his identity because he knew that his contacts were unwelcome. Finally, we note that a police officer testified that in June 1994 he warned defendant to stay away from the victim or he would be criminally charged. On this evidence, a jury could have reasonably found that defendant engaged in unconsented contact.

Turning to the two final elements of the offense, we conclude that sufficient evidence was presented to establish both that the unconsented to acts would cause a reasonable person to suffer emotional distress, and that the victim actually suffered emotional distress due to these unconsented to contacts. Given defendant's age and the victim's age, defendant's repeated attempts to contact the victim, and the victim's knowledge that defendant

was not supposed to do so, the jury could reasonably have concluded that a reasonable person in the victim's position would have experienced emotional distress. The evidence also supports a finding that the victim did experience emotional distress. Not only did the victim herself testify that she came to fear defendant's contacts, but the victim's neighbor testified that she was practically hysterical, shaking and trembling after defendant tried to speak with her in September 1994.

Finally, defendant next contends that his trial counsel was ineffective when he failed to include in his motion for directed verdict the argument that the victim's mother consented to defendant's contacts with the victim. We disagree. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*[2] hearing, our review of his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

We first take issue with defendant's assertion that the victim's mother had actually consented to the continuing

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

contacts. The record shows that the mother agreed to allow defendant to give her daughter some stuffed animals in 1990. We do not believe the mother's acquiescence to this specific request meant that the mother had granted defendant carte blanche to approach her daughter whenever he wanted. Furthermore, the victim's father testified that it occurred before he warned defendant to stay away from his daughter. Even if defendant's testimony as to the timing of this conversation were believed (defendant claimed the warning came after the conversation with the victim's mother), it should have been clear to defendant from the victim's responses to his contacts that regardless of how he interpreted the contact with the mother, the victim herself had not consented to any contact with defendant. Accordingly, we conclude that because any such motion would have been meritless, defendant has failed to establish that his counsel's assistance was ineffective. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

STATE OF MICHIGAN

17TH DISTRICT COURT (WAYNE COUNTY)

THE PEOPLE OF THE
CHARTER TOWNSHIP
OF REDFORD

V

MICHAEL JOHN BAK

Defendant.
_____/

District No.
94-54,441 CM
Circuit No.
95-529988-AV

MOTION

BEFORE THE HONORABLE
KAREN S. KHALIL, DISTRICT JUDGE

REDFORD TOWNSHIP, MICHIGAN -
Monday, June 12, 1995

APPEARANCES:

For the People of the
charter Township of Redford:
Mr. Vahan C. Vanerian
33900 Schoolcraft
Livonia, MI 48150

For the Defendant:
Mr. Laurence H. Peppler
66 Market Street
Mt. Clemens, MI 48043-5637

Court Reporter:
Mr. John D. Edwards, CSR/CER 3901
Official Court Reporter

* * *

MR. PEPPLER: Laurence Peppler appearing with and on behalf of the defendant Michael John Bak.

THE COURT: Based on your written briefs, as well as, your arguments, the Court finds that the Ordinance is constitutional. I do not find it to be overly broad or vague. And in applying a reasonable person test to the prescribed conduct, the Court finds the Ordinance clearly defines the prohibitions, provides adequate notice for the prescribed conduct and does not in hinge [sic] on First Amendment freedoms. Given the age and intellectual ability of the defendant, as well as, the victim's young age, the reasonable person test allows for a cause of action pursuant to the Statute.

What is a little bit more controlling to me or of concern to me is the issue relating to the Complaint and the inclusion of certain instances of conduct which occurred prior to the enactment of the State Statute and a local Ordinance. However, based on the arguments, the Court does not find that at this time the cause of action should be dismissed. I think it needs to be more clearly defined. If you want to file a Motion and ask for clarification on the point as to what particular information the prosecution intends on producing for purposes of establishing a course of conduct, and whether or not that will include those incidents which allegedly occurred prior to the enactment of the statute and their local ordinance.

This Court does have this matter set for a jury trial on June the 30th, 1995. So, this Court's denial of the Motion to Dismiss will require that we proceed on that date at 8:30 in the morning.

MR. PEPPLER: I will be filing such a Motion, Your Honor, as Your Honor suggested because I certainly don't know the offense the prosecution plans on producing evidence.

THE COURT: The concern that I have is if I dismiss the complaint at this

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STATE OF MICHIGAN

17TH DISTRICT COURT (WAYNE COUNTY)

THE PEOPLE OF THE
CHARTER TOWNSHIP
OF REDFORD

V

MICHAEL JOHN BAK

Defendant.
----------/

District No.
94-54-411-CM
Circuit No.
95-52-9988AV

JURY TRIAL

BEFORE THE HONORABLE
KAREN S. KHALIL, DISTRICT JUDGE

REDFORD TOWNSHIP, MICHIGAN -
Friday, August 11, 1995

APPEARANCES:

For the People of the
Township of Redford:
Mr. Vahan C. Vanerian
Assistant Prosecuting Attorney
33900 Schoolcraft
Livonia, MI 48150

For the Defendant:
Mr. Laurence H. Peppler
66 Market Street
Mt. Clemens, MI 48043-5637

Court Reporter:
Mr. John D. Edwards, CSR/CER 3901
Official Court Reporter

* * *

McHenry ever gave any kind of notice to my client. There's nothing in any police report I ever received. This is the first time I ever heard this evidence.

THE COURT: All right. The Court will grant in-part the Motion in Limine. The Court will not allow testimony relating to other children that would have been in contact or would have come in contact with the defendant in this case. In addition, the Court will exclude evidence of prior contact by the defendant with the victim, prior contact meaning contact prior to the date that the statute was enacted. However, it will allow testimony which would lay a foundation for the jury to understand that the victim did know the defendant and had had some contact with him prior to the date that the statute was enacted, but it will not allow the prosecution to delve into the areas which would establish a course of conduct prior to the enactment of the statute.

MR. PEPPLER: And I would like to know, Your Honor, what this proposed testimony is from Mr. McHenry and when this supposed notice was given to my client because this is the first I've heard of it

THE COURT: Okay. I'm not going to take that up right now.

MR. PEPPLER: But I don't want any mention of that made. I would ask that no mention of that be made before this jury.

THE COURT: Well, again, that would come within the purview that the court has already ruled on.

MR. PEPPLER: Thank you.

THE COURT: But if it is to establish that the father of the victim had contact with the defendant, that he knew the defendant, that he had had a conversation, that would be allowed. I'm not going to allow specifics.

MR. PEPPLER: Not the nature of the conversation with the defendant

THE COURT: I'll allow that there was contact between the victim's father and the defendant prior to the enactment of the statute, and that there was some relationship established prior to the enactment of the statute. So, you can go ahead and do that.

MR. VANERIAN: Why – Well, what's the basis for not allowing the father to testify that he told Mr. Bak, stay away from my daughter?

THE COURT: Are you going to use it for purposes of establishing that the warning was given for purposes of fulfilling the requirement of the statute? Is that the warning that you're going to use in order to fulfill the purpose of the statute?

MR. VANERIAN: Well, that's going to be one – that's going to be one of them. But, Your Honor –

THE COURT: Now, wait a minute.

MR. VANERIAN: This is not an act –

THE COURT: Wait a minute.

MR. VANERIAN: – that Mr. Bak is being prosecuted for. This is the act of the father. You know, this is not an act of the part of the defendant which he's being prosecuted for.

THE COURT: You're going to admit testimony or you're going to seek testimony from other witnesses relating to a subsequent warning which was given?

MR. VANERIAN: I'm going to illicit [sic] testimony from the father that he went to Mr. Bak's house and told him to leave his daughter alone. And that occurred prior to the enactment of the statute.

THE COURT: That wouldn't go to the course of conduct.

MR. PEPPLER: I would like to know when this occurred.

THE COURT: Wait a minute. Answer my question.

MR. VANERIAN: He's not being punished for Mr. McHenry's warning. His conduct is the contact with the victim. And that's what's at issue here.

THE COURT: All right. I'll allow that testimony as well.

MR. PEPPLER: Your Honor?

THE COURT: I'm not going to argue it.

MR. PEPPLER: Your Honor, I don't want to argue.

THE COURT: I'm not going to argue it.

MR. PEPPLER: I'd like to make a record.

THE COURT: The Court has ruled.

MR. PEPPLER: I understand, but I'd like to make a record.

THE COURT: Go ahead.

MR. PEPPLER: I'd like to make a record that number one, this is far more prejudicial than probative. What Mr. Vanerian is trying to do is get in the back door which the court just excluded. It's going to put in the jury's mind the fact that there was something that Mr. Bak did that was wrong. Now, that father can't testify – just because he went over and told Mr. Bak not to have any contact with his daughter, I mean, that doesn't mean anything. All right, you know, that doesn't mean that Mr. Bak did anything.

However, it's going to implant in the jury's mind that Mr. Bak had engaged in things and they're going to try to make out elements prior to the enactment of the statute. Now, I'd like to know the date. I think the date is very germaine [sic] to this. If it occurred three years prior to any first – the first act that it could be charged underneath the statute, I don't think it's relevant at all and extremely prejudicial.

MR. VANERIAN: Your Honor, let me just make an illustration here. A woman receives a heart box shape of chocolate from a man. Now, would that cause a reasonable person to feel threatened, harassed or intimidated? You can't tell just by looking at that alone. Most people would probably say, no, it's not. It's probably an act of kindness. And it would be if that man was the woman's husband. But if that's the man who was convicted of raping the woman a year before, then that would very much. Then that act would cause a reasonable person to feel threatened, harassed or intimidated, and it would be admissible for the purpose of proving that particular element. And that's why I think that the contact, that the whole course of history, the picture here, you can't just

take these instances of contact and take them out of context and put them in a vacuum and say, well, would this cause a reasonable person to feel harassed or intimidated? That's – you know, you just can't do it. I mean, you got to look at the whole –

THE COURT: Once you establish a course of conduct, this Court will require that you provide evidence which would meet the requirements under the statute after the date the statute was enacted. Again, the Court will allow you –

MR. VANERIAN: I think –

THE COURT: I'm not going to argue with you, Mr. Vanerian. The Court will allow you to introduce evidence that the victim had contact with the defendant prior to the enactment of the statute. The Court will also allow you to admit evidence that the father had contact with the victim – or with the defendant prior to enactment of the statute, and the Court will allow you to illicit [sic] the testimony which would show that the father gave warning to the defendant prior to the enactment of the statute.

MR. PEPPLER: I would like to know when that occurred, Your Honor.

MR. VANERIAN: That occurred after Mr. Bak followed her home. That would have been in September of 1990.

State of the [sic] Michigan
in the Circuit Court for the State of Michigan

PEOPLE OF THE
TOWNSHIP OF REDFORD,
Plaintiff/Appellee,
v.
MICHAEL JOHN BAK,
Defendant/Appellant.

NO. 95-529988 AV
HON. JOHN A. MURPHY

MR. DANIEL BESSER
MR. LAURENCE H. PEPPLER
Attorneys for Appellant
66 Market Street
Mt. Clemens, MI 48043-5637

MS. GAIL MASSAD
Attorney for Appellee
33900 Schoolcraft Road
Livonia, MI 48150

ORDER AND OPINION AFFIRMING APPELLANT'S CONVICTION

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan, on March 26, 1996

PRESENT: THE HONORABLE JOHN A. MURPHY

The instant appeal arises from Appellant's conviction under Appellee's stalking ordinance, TOWNSHIP OF REDFORD, CODE OF ORDINANCES ch. 58, art. III, sec. 58-60. The ordinance was enacted in 1993. The ordinance, as Appellee notes, for our purposes here "mirrors" the state stalking statute, MCLA 750.411h. *See* Appellee's Brief at 8-9.

Appellant here was convicted of stalking a child. Apparently he and the child first met when the child was in the fifth grade. Appellant worked at basketball games the child attended.

There were a series of contacts over the next years. Appellant and Appellee take different views of the nature of these contacts. Appellant stresses that they were fortuitous and accordingly informal, and that the complainant did not appear to be frightened by them or by him. Appellee City contests the asserted harmless nature of these meetings. For instance, Appellee argues that in September 1990 Appellant, in meeting the complainant and her friend, grabbed the book bag of the friend and frightened both girls; Appellee argues that this was only one of several instances in which Appellant followed complainant home from school. Another purported instance of physical contact between Appellant and complainant happened at one of the meetings at the basketball games, when, Complainant testified, Appellant "took [her] hands" and "sp[u]n [her] around." Transcript at 76. The complainant also testified that other people were present at the time and that Appellant spun some of them around as well. *Id.* at 77.

Appellant also appears to have initiated other types of contacts with the complainant. On at least two occasions, he sent her cards, once for her graduation and once for her birthday.

At trial itself, testimony focused on two meetings between the complainant and the Appellant. One meeting appears to have occurred in September 1993, at a fair. The complainant was then fourteen years old. Appellant admits that he approached the youth, that the youth was frightened, and that the youth stated that she did not want to talk to the Appellant. Appellant also stresses that he made no attempt to threaten or sexually abuse the child. The Appellant did end up giving the complainant

something – some stuffed animals. *Id.* at 67. At trial, the complainant testified that she did not accept these gifts willingly but took them only because she believed that the Appellant would not leave her alone unless she accepted them. *Id.* at 68. Appellant testified that she was "scared." *Id.*

Testimony at trial also centered on a second meeting, one that took place at complainant's confirmation in March 1994, thus approximately six months after the graduation incident. In the interval, Complainant and Appellant had seen each other occasionally at church. Complainant testified that Appellant made no effort to initiate contact with her during these meetings at church. *Id.* at 82. However, it should be noted that in another part of her testimony Complainant did say that Appellant would sometimes stare at her in Church. *Id.* at 85.

The March 1994 incident happened at a reception for Complainant and others who had just been confirmed. Appellant showed up at the gym where the reception was held. Complainant testified that Appellant approached her, said hello, and that Appellant then walked away. *Id.* at 70.

The immediate cause of Appellant's arrest appears to have been a September 1994 encounter with the complainant. Complainant was talking with a friend by the entrance to her church, in the vestibule, to be precise. Complainant testified that Appellant came over and asked to talk to her. Complainant further testified that she repeatedly told him "no" but that Appellant kept insisting that he needed to talk to her. *Id.* at 86-87. Complainant also testified at trial that when she walked away

from Appellant then she went toward a police officer. *Id.* at 87.

Trial was held on August 11, 1995, before a jury in the 17th District Court. Prior to trial, Defendant-Appellant attempted to dismiss the case against him on the grounds that the ordinance at issue here was unconstitutionally vague and overbroad. This motion was denied. Counsel for defendant also brought a motion to exclude certain evidence from the trial. This evidence pertained to the meetings that had taken place between Appellant and complainant before the enactment of either the ordinance or the statute, that is, before 1993. appellant argued that admitting evidence of such meetings violated the Federal and State Constitutions' Ex Post Facto Clauses. This motion was granted in part; the Court ruled that the only evidence pertaining to contacts before the date of enactment that was admissible was evidence of a contact not between Appellant and Complainant but between Appellant and complainant's father: namely, a telephone call in which complainant's father purportedly told the Appellant to leave his child alone.

However, more evidence than just of the telephone conversation alone ended up being admitted at trial. This happened because the trial judge ruled that Defendant-Appellant's counsel "opened the door" to admission of such testimony when, in cross-examining complainant, he asked her about some pre-1993 contacts himself, including the incident at the game when Appellant purportedly "spun complainant around." On redirect, thus, the prosecutor asked complainant about the incident when, complainant testified, Appellant approached her and her friend on their way home from school and ended up

"pull[ing]" the friend's schoolbag until pencils fell out. *Id.* at 93. This incident occurred before the enactment of the ordinance.

At the end of trial, Appellant moved for a directed verdict of not guilty. This was denied; the jury deliberated and rendered a verdict of guilty. Appellant has filed a timely appeal to contest this verdict.

Appellant raises three issues on appeal: alleged error by the trial court in denying Defendant-Appellant's motion for a directed verdict; unconstitutionality of the stalking ordinance itself on grounds of vagueness and overbreadth; and the argument from the Ex Post Facto Clause discussed above.

We start with the first issue. Appellant argues that the trial court erred in denying his motion for a directed verdict of not guilty. Appellant argues that there was insufficient evidence to establish all of the necessary elements of the crime here, at least beyond a reasonable doubt.

Appellant's argument here appears to boil down to the nature of the contacts between Defendant-Appellant and complainant here.[1] Appellant contends that none of

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[1] Thus, we do not dwell on whether there was sufficient evidence admitted to support the occurrence of each of the alleged contacts between complainant and Appellant discussed. Suffice it to say that as to each of these incidents we have at least the testimony of the complainant herself to support the version given; while Appellant may have presented evidence to contest either the occurrence of the contact itself or its nature, this was an issue of credibility that the jury was better positioned than this Court to decide.

these contacts could remotely be characterized as being hostile or intimidating. Appellant argues that stalking is a crime that involve making threatening contacts with the victim.

The natural place to begin is with the words of the statute/ordinance. The ordinance's definition of stalking is set forth in subsection (1)(d):

> "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.
>
> Harassment, in turn, is defined as:
>
> . . . conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

An immediate problem arise: the ordinance talks about the reasonable person and his or her perceptions; the complainant here is a child, and we need to know if the term "reasonable person" allows us to take into account the fact that children may find some things frightening

that an adult would not.[2] Can "reasonable person" translate into "reasonable child"?

We find it difficult to so extend the definition of reasonable person in this instance. Criminal liability is at stake here. While it is true that in the context of torts the judicial inclination is to modify the term *reasonable person* to *reasonable child* when the issue is foreseeability from a child's standpoint, *see* RESTATEMENT (SECOND) OF TORTS sec. 283A, extending this to a criminal context is something we are reluctant to do absent express legislative authorization. We note also that when legislatures have sought to define stalking from the perspective of the child, they have done so explicitly. *See, e.g.*, CAL. PENAL CODE SEC. 11414 (defining intentional harassment of the child as "conduct [that] must be such as would cause a to suffer [sic] reasonable child to suffer substantial emotional distress") (emphasis added). The term employed here is "reasonable person," not "reasonable child," and we must interpret the ordinance accordingly.

It is hard to define "stalking" comprehensively. Part of the problem is that stalking statutes are prophylactic in nature: the idea is to apprehend the stalker and protect his victim before he has a chance to harm the victim. This argues for an intent, or at least a possibility, of holding actors liable even for acts harmless on their surface if such acts betray an intent to maliciously harass someone.

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[2] This is the argument Appellee implicitly attempts when it asks us to view "a course of conduct engaged in by an adult, approximately 36 to 40 years of age, over a period of four years towards [sic] a child, beginning at age 10 and continuing to age 14."

On the other hand, there is a natural reluctance in the law to punish people for acts that in and of themselves are harmless.

Another part of the problem is that the aim in deterring stalking is not only to prevent the actual occurrence of physical harm but to stop the fear that threats themselves create, even absent any physical harm. Stalking laws aim to protect victims against stalkers who may be just bluffing in making their threats. *Cr. R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (noting, in the context of hate crimes, that threats are not protected by the First Amendment partly because of the "disruptoin that fear engenders").

The ordinance at issue appears to necessitate seriously egregious conduct for it to apply to a person's contacts with another. The definition of stalking above includes terms like "harassing" and "threatening" . . . terms that are not to be taken lightly and that would appear to demand conduct that does more than merely annoy.

However, the situation is complicated by the fact that the ordinance allows a presumption as follows:

> In a prosecution of this section evidence that the defendant continued to engage in a course of conduct involving repeated, unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact and to refrain from any further unconsented contact with the victim shall give rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized,

> frightened, intimated, threatened, harassed or molested.

Nonetheless, as written the presumption extends only so far: it does not allow us to satisfy the standard that a reasonable person must feel the conduct to be terrorizing, frightening, and the like.

Was Appellant's conduct here such as to terrorize and threaten the reasonable person?

As to most of the incidents, we would say no. Sending unsolicited and unwanted birthday cards and the like may annoy but it is difficult to see such behavior as threatening.

However, in September 1990 we believe Defendant-Appellant crossed the line from merely annoying to threatening and harassing. This was when he insisted on walking and talking to the girls on the way home from school until the point that he grabbed one of the girl's book bags. Here Defendant clearly initiated physical contact, or at least the threat thereof. Appellant may dispute this version of the events, but there was testimony to it at trial; the jury apparently chose to believe such testimony. Combining this event with the other events we believe that a jury could find a case of stalking here: there is pattern of events that includes events that a reasonable person could feel threatened by.[3]

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[3] What we are doing here then is rejecting the requirement that each and every event, viewed in isolation, be seen as being harassing. The ordinance focuses on a "course of conduct, and speaks of such a course as being a [sic] "a pattern of conduct composed of a series of two or more separate noncontinuous

Moreover, there was evidence at trial that complainant in fact did feel threatened and harassed. Complainant testified to being scared; a neighbor found complainant "hysterical" after the September 1994 incident. Complainant quibbles here: he wants to argue that some of his contacts with complainant did not frighten her. But even if true, this ignores the fact that any reasonable interpretation of stalking does not demand that we look at each and every event at each and every instant to determine fear. Stalking is a pattern of conduct; we look both at each event *and* their sum total to determine if the net result has been to leave the victim fearful. Indeed, it is common for stalkers to begin their stalking with innocent, even pleasing activities that do not frighten the victim until repeated contacts make clear that the stalker refuses to leave the victim alone, and the law of stalking must recognize this.

We now turn to the constitutionality of the ordinance. Defendant-Appellant argues here that the ordinance is

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acts, evidencing a continuity of purpose." We believe that elements of the pattern can and must be interpreted in light of other elements. Thus, there is a difference between someone waving at someone in and by itself and someone waving at someone the day after he has threatened to kill her. The latter wave cannot reasonably be construed as the same innocent act the former probably is.

In the instant case, we have a series of events that admittedly in isolation are not terrorizing. Sending someone a birthday or confirmation card is not equivalent to terrorizing them. But here there was evidence at trial that Appellant maintained the string of acts, however innocent in themselves, after having harassed complainant to the point of physically threatening her in the schoolbag incident.

both vague and overbroad and therefore unconstitutional under both the State and Federal Constitutions.

We do not find the ordinance to be vague. The key here appears to be the "reasonable person" requirement enumerated above. This requirement is enough of an anchor to give a clear idea of the range of conduct liable under the ordinance.

An inquiry into vagueness is two-part: First is the question of whether the ordinance gives notice; that is, whether the ordinance "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352 (1983). Second is the consistency requirement: the provision at issue must be explicit enough that it cannot be applied in an arbitrary or discriminatory manner: we need standards that guide and constrain the enforcer. In practice, many of the arguments concerning the first prong of the test – notice – shade over into arguments concerning the second prong of the test – administrative discretion.

As our discussion above shows, the ordinance here has certain prerequisites to its application. We require conduct that does not merely annoy but that "terrorizes." The word "terrorize" is not a week term – it mandates conduct of a dangerous and egregious nature. Moreover, such "terrorism" cannot exist only in the minds of the self-professed victim: we require conduct that a reasonable person finds threatening and terroristic and emotionally distressing. Note that a twofold requirement of reasonability is imposed here: both the nature of the act and the damage suffered are constrained.

This is not to say that the conduct that is proscribed here is of a bright-line right-or-wrong nature; but this may be because stalking itself is not susceptible to such a definition. As shown above, we were able to apply the ordinance in the instant situation in a clear-cut manner: we held that the act of sending birthday cards could not possibly meet the ordinance here, but the act of following complainant and her friend to the point that possession of their belongings was interfered with can – at least when combined with Appellant's repeated attempts to contact or send complainant things. As we mentioned above. Appellant crossed a clear line here.

Moreover, the definition of stalking involves not just any crossing of the line but a "willful" or intentional one. This is important here because in assessing the vagueness, or lack thereof, of an ordinance or statute courts will focus on the necessary scienter requirement. As the U.S. Supreme Court has put it, to punish acts "knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act . . . is a violation of the law." *Screws v. United States*, 325 U.S. 91, 102 (1945).

We do admit that this "willfulness requirement" is somewhat watered down here in that what is apparently required to be willful by the ordinance (and the statute) is not the actual causing of emotional distress but only the unconsented contact with the individual itself.[4] That is,

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[4] *Compare, e.g.*, CAL. PENAL CODE sec. 646.9 (West 1996) (requiring that stalker "willfully, maliciously, and repeatedly follows or harassed another person" *and* "make a credible threat with the intent to place that person in reasonable fear of death

the ordinance is apparently written so as to include the type of stalking resulting from erotomania, in which the stalker pursues his victim not with any intent to frighten her but only because he is obsessively in love with the victim and wishes to express his romantic admiration and seek its reciprocal in the victim: "Stalking means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person. . . . "[5] But as explained *supra*,

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or great bodily injury"). Thus, the Californian stalking statute does not appear to include the actions of the hopelessly lovelorn who pursues his victim not intending to frighten or threaten her but only to express his devotion, however excessive such conduct might be.

[5] In construing "willful" here as not requiring a specific intent to inflict emotional distress, we are adopting what we see to be the more natural reading of the ordinance. The plain words of the ordinance, quoted *supra* in the text, speak of a "willful" course of conduct to contact another but do not extend this willfulness to the actual causing of emotional distress in the victim itself. We note that this interpretation, which allows the language to extend to instances of erotomania free of what is commonly regarded as hostile intent, appears to be consistent with the intent of the Michigan Legislature in enacting MCLA 750.540e, and we have no evidence that the Township of Redford intended anything different in its version. *See, e.g., Anti-Stalking Legislation, 1992: Hearings Before the Sen. Judiciary Comm.*, 102d Cong., 2d Sess. (1992) (statement of Mich. State Rep. Perry Bullard, *cited in* Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 1009 n. 162 (1993).

Mentioning Robert Guy's piece brings up yet another potential complication here in that Guy apparently sees the willfulness requirement of the statute/ordinance, at least as interpreted by us here, as making the statute a "strict liability" statute, *id.* at 1009, and as thus enacting high hurdles indeed to

willfulness, even as confined here to course of conduct alone, does not obviate all considerations of deliberate wrongdoing but rather eschews a specific-intent standard in favor of a more generalized notion of acting with "evil intent." A person who willfully pursues a course of conduct involving repeated contacts with another, even if he himself believes these contacts to be desirable and non-threatening, is still doing *something* deliberately. Thus, a requirement of scienter still exists and still works to save the ordinance from vagueness. Again as the Supreme Court has put it, a statute that penalizes acts "knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack

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its constitutionality since the constitutionality of a strict liability criminal statute is never easy to maintain. *See* Wayne LaFave & Austin Scott, Criminal Law sec. 2.12(d) (1986) (citing cases).

However, this does not appear to be a proper interpretation of the ordinance/statute, at least according to the dictates of Michigan law.

It is true that "willfully," under Michigan law, has been interpreted to mean "something less than specific intent." *People v. Beaudin*, 110 Mich. App. 147, 152 (1981), *rev'd*, 417 Mich. 570 (1983). However, this does not mean that the term entails no sort of intent at all. While it is hard to pin down any one meaning for the term, equivalents to it are constructions like "evil intent," bad purpose," and "guilty knowledge." *See, e.g., People v. Lerma*, 66 Mich. App. 566 (1976). Thus, in employing the construction "willful course of conduct" in the stalking ordinance/statute the authorities did not intend to wash the offense of all taint of deliberate pursuit of "evil": stalking involves an intent to deliberately pursue a course of conduct with the knowledge that the ends in view are not legitimate. This can still cover the erotomaniac, because in pursuing his inamorata, he can do so knowing that he intends no harm but that the acts fall outside the law.

of warning or knowledge that the act . . . is a violation of the law." *Screws*, 325 U.S. at 102. Moreover, the conduct must still be such as to cause a reasonable person to suffer emotional distress: thus the scienter and reasonable person requirements intertwine to bind the discretion of law enforcement officers.

We now turn to overbreadth. The ordinance contains explicit language mandating that its application be confined to constitutionally protected activities: "Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." Such language insulates the ordinance from overbreadth challenges by its plain meaning.[6]

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[6] We admit to a potential complication here. Laurence Tribe has adduced the following argument in discussing the relationship between overbreadth and vagueness:

> This relationship is most sharply focused in a hypothetical statute: *"It shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendments."* This statute is guaranteed not to be overbroad since, by its terms, it literally forbids nothing that the Constitution protects. The statute is nonetheless patently vague. . . .

Laurence Tribe, American Constitutional Law sec. 12-29, at 1031 (2d ed. 1988). Thus, for Tribe, any progress the clause in question achieves toward resolving the overbreath problem here merely reintroduces the vagueness problem. *But cf.* Richard Fallon, *The Problem with Overbreadth*, 100 Yale L.J. 853, 905 (1991) (arguing that whatever the merits of Tribe's argument substantively, the problem is still really one of overbreadth, not vagueness).

Whatever its correct label, Tribe's argument appears to have been rejected by the Supreme Court. *See, e.g., Arnett v. Kennedy*, 416 U.S. 134, 162 (1974) (rejecting challenge of overbreadth to

Moreover, the ordinance's requirement, delineated in the discussion of vagueness *supra*, that stalking consist only of conduct that would cause a reasonable person to feel "terrorized" or "intimidated" confines the scope of the statute here to prohibiting conduct that lacks constitutional protection. Individuals do have a constitutionally protected right to freedom of movement. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). But when conduct as well as speech is implicated, as it surely is in stalking, "the overbreadth of a statute must not only be real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (emphasis added). Here the ordinance's requirement that the "terrorizing" nature of the conduct be such as to threaten a "reasonable person," as well as the requirement that the emotional distress engendered be "significant," means that the ordinance does not infringe on activity such as that involved in ordinary romantic pursuits and the like – activity that is constitutionally protected because it poses no threat to the reasonable individual.

Finally, in rejecting Appellant's constitutional challenges to the ordinance, we are upholding the Court of

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statute whose language excluded speech that is constitutionally protected).

Moreover, to the extent that vagueness is again a problem, we may rely on our analysis above in holding the statute/ordinance not to be vague. The clause in question emphasizes that the ordinance does not reach constitutionally protected conduct; the contours of the ordinance's reach are delineated above, where we argued that it reaches willful conduct that only a reasonable person would find threatening.

Appeals decision in *People v. White,* 212 Mich. App. 298 (1995), in which the Court held that the Michigan stalking statute was not void on grounds of either vagueness or overbreadth.

We arrive at Appellant's third and final argument. This is an argument from the Ex Post Facto Clause and involves admission of statements by complainant's father warning Appellant to stay away from the complainant and admission of evidence pertaining to contacts between the complainant and the Appellant prior to the ordinance's enactment. Appellant argues against admission of these statements on the grounds that these statements and acts were made and done before the enactment of the ordinance and therefore represent a backdoor attempt to punish Appellant for acts that were proper, or at least not illegal, when they were done. As Mr. Peppler framed the issue to the trial judge:

> All the elements of the crime have to transpire after an ordinance or after a statute under which a person's being charged. All of the elements. Some of the elements can't have occurred prior to that and some afterwards.

Transcript at 7. For his part, as related above, the trial judge ruled that while evidence of the past acts could not be admitted in general, evidence that the father of the complainant had warned Appellant to stay away from his child – the date of the warning being before the date of enactment – was admissible. *Id.* at 9. As also related above, this ruling went by the wayside when the judge held that Defendant-Appellant's counsel had opened the door to testimony about pre-enactment contacts in cross-examining complainant.

We need not reach the "opening the door" issue itself here, for we go even farther and hold that evidence of acts constituting the pattern of harassment here would have been admissible at trial even absent defense counsel's opening of the door.

Appellant's argument has a surface validity. The Ex Post Facto Clause of the Federal Constitution[7] holds that "[n]o . . . ex post facto Law shall be passed." U.S. Const. art. I, sec. 9, cl. 3. The U.S. Supreme Court has interpreted this Clause to mean that a law may not be passed if it makes something a crime that was not a crime when it was done. Appellant argues here that any acts committed before the enactment of the stalking ordinance that the prosecution used here, including the warning by the complainant's father, constitute precisely such after-the-fact criminalization.

However, the caselaw fails Appellant here. The law holds that while a defendant may not be convicted for a past offense, he may be convicted for an offense that continues after the enactment of the law in question. *See United States v. Poulos*, 895 F.2d 1113, 1120 (6th Cir. 1990). Appellant here is not being punished for his pre-enactment course of conduct of harassing complainant but for

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[7] Appellant here also brings his argument under the corresponding clause of the State Constitution. However, our analysis of the Federal Clause will suffice for both the federal and state claims here since Appellant cannot look to the State Clause to provide him greater protection than the Federal Clause. *See In re Certified Question (Fun 'N Sun RV, Inc. v. Michigan)*, 447 Mich. 765, 777 n.13 (1994), *cert. denied*, 115 S. Ct. 2000 (1995).

continuing this conduct even after the stalking ordinance came into existence.

Such a construction of the Ex Post Facto Clause makes sense in terms of the values the Clause is designed to protect. The Clause is intended to guard against the imposition of criminal liability without warning or, to put it another way, to safeguard reasonable reliance on the state of the law. These values were not contravened here. Once the ordinance was passed, Appellant faced a choice: whether to continue his course of conduct involving the complainant despite the potential for future acts of contact – perhaps combined with, but not solely based on, past acts – to create liability. Appellant here apparently made the choice to continue contacting the complainant. This was a risk freely assumed, and justice does not demand that Appellant be protected from the consequences of his actions here. Indeed, if justice demands anything it is that stalkers not be shielded merely because they began stalking before the passage of the statute/ordinance at least when they continue the stalking after passage.

Thus, if any mistake was made here, it was one in the Appellant's favor in that the trial judge did not admit as much evidence of the earlier acts as he could have; accordingly, Appellant cannot use this to reverse his conviction.

Accordingly, having found Appellant's appeal to be without merit, we uphold his conviction by the lower court.

IT IS SO ORDERED.

/s/ JUDGE JOHN A. MURPHY
JOHN A. MURPHY
CIRCUIT COURT JUDGE

A TRUE COPY
TEOLA P HUNTER
WAYNE COUNTY CLERK

By /s/ [Illegible]
DEPUTY CLERK

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF WAYNE

PEOPLE OF THE
CHARTER TOWNSHIP
OF REDFORD.
Plaintiff-Appellee,
v.
MICHAEL JOHN BAK,
Defendant-Appellant.
_____/

Case No.: 95-529988 AV
HON. JOHN A. MURPHY

Vahan C. Vanerian (P48196)
Attorney for Plaintiff-Appellee
33900 Schoolcraft
Livonia, MI 48150
(313) 261-2400

Ben M. Gonek (P43716)
Attorney for Defendant-Appellant
407 E. Fort St., Ste. 400
Detroit, MI 48226
(313) 964-2255
_____/

ORDER DENYING DEFENDANT-APPELLANT BAK'S MOTION FOR RECONSIDERATION

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan on: April 23, 1996

HON: JOHN A. MURPHY

This matter having come before the Court on Defendant-Appellant Bak's motion for reconsideration.

No palpable error on the part of the Court having been shown, as required by MCR 2.119(F)(3), and

The Court being otherwise fully advised in the premises, IT IS HEREBY ORDERED that Defendant's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

JUDGE JOHN A. MURPHY
JOHN A. MURPHY
CIRCUIT COURT JUDGE

Court of Appeals, State of Michigan

ORDER

People of Redford Township
v Michael John Bak

Docket # 198467

L.C. # 95 529988 AV

Jane E. Markey
Presiding Judge

William B. Murphy
Janet T. Neff

Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

The motion to add an additional issue is GRANTED.

[SEAL] A true copy entered and certified by Ella Williams, Chief Clerk, on

Mar 5, 1997 /s/ Ella Williams
Date Chief Clerk

Order
Entered: May 27, 1998

Michigan Supreme Court
Lansing, Michigan

[Names Omitted In Printing]

108971

PEOPLE OF THE TOWNSHIP OF REDFORD,

Plaintiff-Appellee,

v

MICHAEL JOHN BAK,

Defendant-Appellant.

SC: 108971
COA: 198467
CC: 95-529988 AV
DC: 94-54-441 CM

On order of the Court, the application for leave to appeal is considered and, pursuant to MCR 7.301(F)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

C0520

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 27, 1998 /s/ Corbin R. Davis

Court of Appeals, State of Michigan

ORDER

People of Redford Township v Michael John Bak	Mark J. Cavanagh Presiding Judge
Docket No. 212056	Donald E. Holbrook, Jr.
LC No. 95-529988-AV	Michael J. Kelly Judges

The Court orders that the motion for rehearing is DENIED.

The motion to file later answer is DENIED.

/s/ Mark J. Cavanagh

[SEAL] A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

SEP 28 2000 /s/ Carl L. Gromek
Date Chief Clerk

Order
Entered: June 26, 2001

Michigan Supreme Court
Lansing, Michigan

[Names Omitted In Printing]

118150

PEOPLE OF THE
TOWNSHIP OF REDFORD,

Plaintiff-Appellee,

v

MICHAEL JOHN BAK,

Defendant-Appellant.

SC: 118150
COA: 212056
Wayne CC: 95-529988-AV

On order of the Court, the delayed application for leave to appeal from the July 21, 2000 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

J0619
[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 26, 2001 /s/ [Illegible] Z. Meyer
Deputy Clerk